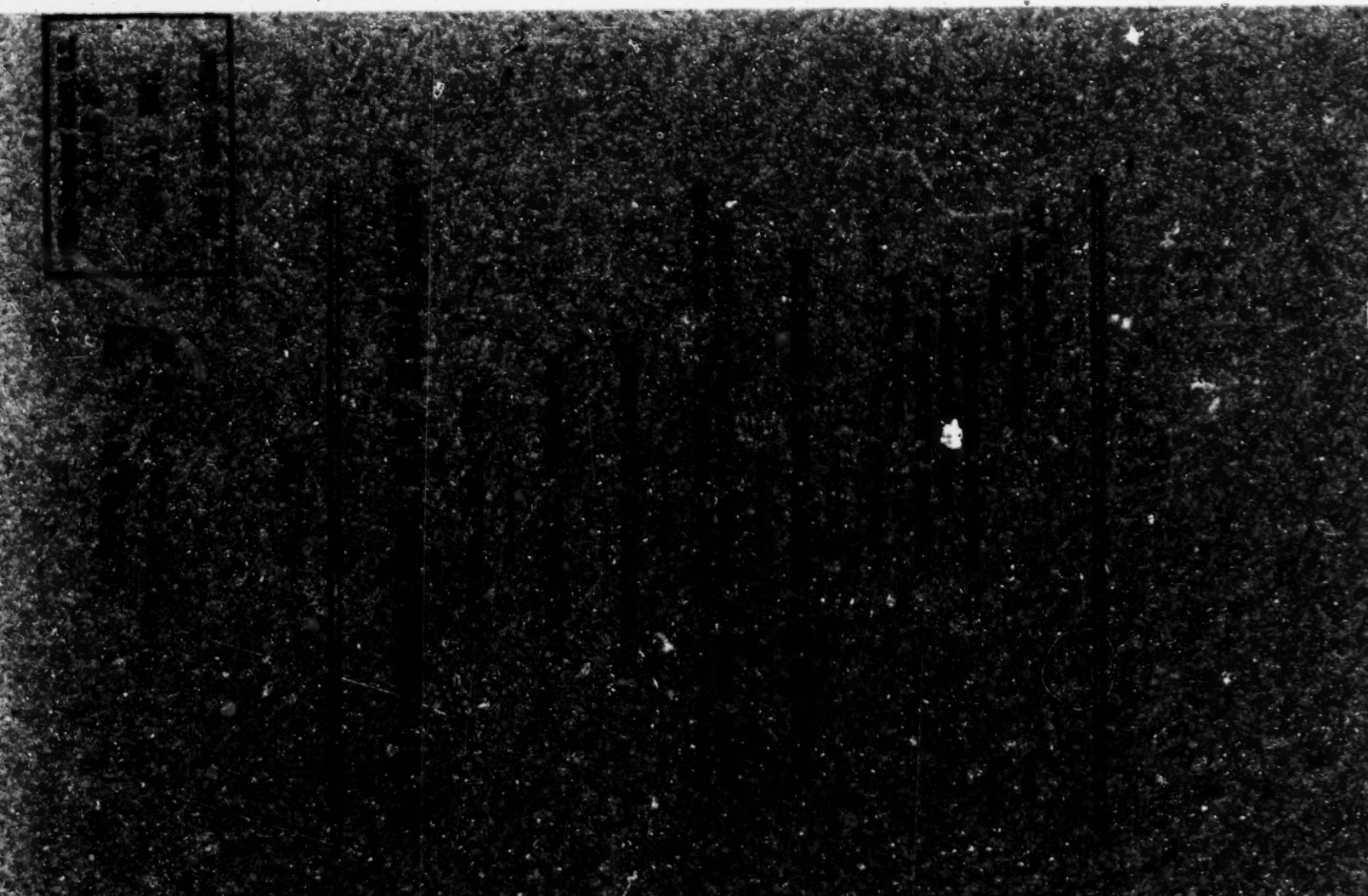

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635453—62

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 787

DALE BRYSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) has not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on December 27, 1961. A petition for rehearing was denied on January 10, 1962. The time for filing a petition for a writ of certiorari was extended by Mr. Justice Brennan to March 9, 1962, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, on a charge of conspiracy to violate the narcotic laws, the judge gave adequate instructions on intent.

2. Whether the fact that the jury acquitted petitioner on one of two counts of conspiracy (which the judge charged were aspects of one agreement) prejudiced petitioner.

STATUTES INVOLVED

The pertinent provisions of the Internal Revenue Code, Title 26, U.S.C. are:

> Section 4704(a)
>
> *General requirement.*—It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.
>
> * * * * *
>
> Section 4705(a)
>
> *General requirement.*—It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate.
>
> Section 7237
>
> (a) Where no specific penalty is otherwise provided.—Whoever commits an offense, or conspires to commit an offense, described in

part I or part II of subchapter A of chapter 39 for which no specific penalty is otherwise provided, shall be imprisoned not less than 2 or more than 10 years and, in addition, may be fined not more than $20,000. * * *

(d) Sale or other transfer without written order.—Whoever commits an offense, or conspires to commit an offense, described in section 4705(a) or section 4742(a) shall be imprisoned not less than 5 or more than 20 years and, in addition, may be fined not more than $20,000. * * *

STATEMENT

An indictment in seven counts was returned against petitioner and others in the United States District Court for the Northern District of Oklahoma (R. 3–16). The first count charged that all defendants engaged in a conspiracy from November 1 to December 8, 1960, to sell narcotic drugs without the written order form required by 26 U.S.C. 4705(a) (R. 3–8). The second count charged a conspiracy among the same defendants to purchase narcotics not in or from the original stamped package, in violation of 26 U.S.C. 4704(a). The other counts charged substantive offenses. Petitioner was named a defendant in counts six and seven, charging sales without order form on December 1, 1960, and December 8, 1960 (R. 9–10). On trial by jury he was convicted on count 1 (charging conspiracy to sell without order form) and count 7 (charging a sale on December 8, 1960) and was given concurrent sentences of imprisonment for five years (R. 11, 14). The court of appeals affirmed the conviction.

The pertinent facts may be summarized as follows:

1. A narcotics agent, using the name of Frank Whalen, went to petitioner's bail bond office in Tulsa on November 1, 1960, and asked if he could get in touch with Clyde Jenkins (R. 29). Petitioner said he would take a message for Jenkins who was out of town (R. 29). Thereafter, in a conversation with petitioner outside the office, the agent said "You know, I have been dealing with Jenkins; you know I bought from him. I want to buy some more. What I need is a connection." Petitioner gave the agent his card and suggested that he call the next day (R. 29–30). The next evening the agent telephoned petitioner's office and spoke with petitioner who asked him to call back in a little while. When the agent did so, petitioner was out but one Don Jones introduced himself as a close friend of Jenkins (R. 31–32). Jones came to see the agent and subsequently sold narcotics to the agent (R. 34–35).

On November 28, 1960, the agent returned to Tulsa and telephoned petitioner who reported that Jones and Jenkins were looking for the agent (R. 37–38). When the agent later asked what petitioner meant by that, petitioner explained that Jones had narcotics for the agent.[1] A sale was consummated on December 1 (R. 40–46). During the course of this transaction delivery was once attempted by "Annette" [Annette Corby] because Jones was in jail. The

[1] According to Whelan and agent Roberts who witnessed the conversation, petitioner said, "Jones has some half grain dilaudid for you, some morphine, and we feel you can make some money off of it" (R. 38–39, 85–86).

agent refused to give her money until he had the narcotics (R. 41). Petitioner, in a telephone conversation with the agent, said that he was getting Jones out of jail but that the agent could have dealt with Annette (R. 44):

> * * * you could have done business with her; she had the stuff. But she just couldn't give it upwithout the money.

The agent at one point told petitioner he would rather deal with "Icicle" (defendant McMurray), Jones' source of supply, "as Jones talks too much" (R. 39). On December 6 the agent, in a telephone conversation, told petitioner he was going to call "Icicle" and refer him to petitioner (R. 49–50). On December 8, McMurray came to see the agent and in conversation reported that petitioner had said the agent was "all right" (R. 51–54). McMurray stated the conditions under which he would deal. Agent Whalen refused to deal that way, but another agent, who was with Whalen posing as a friend, said that he would (R. 54, 90–91). The second agent bought from McMurray 596 tablets of dolophine and a bottle of cocaine, a sale which formed the basis of count 7 (R. 91–95).

Petitioner was arrested by state officers on December 8 for conspiracy to violate the narcotics laws (R. 127–128). When asked if he knew any sources of supply, petitioner first denied any knowledge and then said that a Yankee in a Cadillac was in the narcotics business and that petitioner had given him telephone numbers and vouched for him as a "solid man" to McMurray (R. 129, 143).

2. For petitioner, a deputy sheriff of Tulsa County testified that about December 1, 1960, petitioner told him, "What would you think if I told you that Dillon and Jones and Jenkins was handling dope?" Petitioner, according to the deputy's testimony, said he had received this information by associating with a Yankee named Frank Whalen with lots of money who was buying dope (R. 164). The deputy sheriff did not report this information to anyone (R. 168).

Petitioner, on his own behalf, testified that "Whalen" came to his office looking for Jenkins. Later, when they were downstairs the agent asked for the address of Don Jones which petitioner said he could get upstairs, but the agent said he would call the next day. This was the reason petitioner gave the agent his card. No narcotics were discussed at that time (R. 175–177). Late in November the agent told petitioner he wanted to see Jones from whom he had received "some stuff" (R. 179). When petitioner asked if the agent could use some typewriters, adding machines, and things like that in his business, the agent said "he was more interested in dilaudid." Petitioner asked what dilaudid was, but could not remember the reply (R. 179–180). Petitioner said that he originally thought the agent was a big "fence" and sought information for the deputy sheriff who was particularly interested in burglaries (R. 180–181). Petitioner testified that he did not know McMurray ("Icicle"), when the agent said he was going to refer McMurray to petitioner (R. 183), and that, when McMurray did call him early in the morning asking about Whalen, petitioner said "it seemed

like he was all right" (R. 197). He denied knowing that McMurray was in the narcotics business (R. 197) and denied knowing about the others except as he had learned about their involvement in narcotics from Whalen (R. 181). He did not remember having a conversation with the agent about Annette having the "stuff" with her when she met the agent (R. 195–196).

3. The judge's instructions at the close of the case (R. 210–218) summarized the charges of each of the seven counts of the indictment (R. 210–211) but placed most emphasis on the conspiracy count (R. 211A–214). The judge charged in part (R. 211A):

> Where two or more act together to accomplish something unlawful, a conspiracy is shown, even though there be no direct evidence of an express agreement. An agreement is generally a matter of inference deduced from the acts of the persons accused, done in pursuance of an apparent criminal purpose. It is not necessary that all of the conspirators be acquainted one with another; it may be that they have not been previously associated together. One conspirator may only know a few of the others. But where one who knows that others are acting together to violate the law intentionally cooperates to further the object of the scheme he becomes a party to it.

The judge also charged that an aider and abettor is guilty as a principal and further that one who "wilfully causes an act to be done, which if directly performed by him or another would be an offense against the United States is likewise punishable as a principal." He charged that it is "a violation of the

laws of the United States" for a person to sell narcotics without the prescribed order form or to purchase, sell or distribute except in the original stamped package (R. 212).

The judge explained to the jury that while there were two counts of conspiracy, one charging unlawful sale and the other unlawful purchase, there was only one conspiracy involved, the two counts being separated because the maximum penalty for each statute violated was different (R. 211).[2] In the course of their deliberations, the jury came back with questions, including whether "a person aiding or abetting in the sale of goods, would that automatically be considered that he aided in the purchase of the goods?" The judge said that this would not be automatic (R. 221–222). Thereafter, the jury returned its verdict, finding all defendants on trial guilty of both conspiracy counts, except petitioner and Annette Corby,

[2] The court's instructions on this point were (R. 211–211A):

"While the conspiracy phase of the indictment is separated into two counts, it actually charges only one conspiracy to commit offenses against the United States. Count 1 charging that it was part of the conspiracy that the defendants did wilfully and unlawfully sell narcotic drugs, and Count 2 charging that it was a part of the conspiracy that the defendants would wilifully and unlawfully purchase narcotic drugs. And as I explained to you on your voir dire examination, the only purpose—the only reason for dividing the conspiracy charge into two separate and distinct counts is because under the law the maximum penalty which may be imposed for an offense involving the sale of narcotics is different from maximum penalty that may be imposed under the law for the offense involving the purchase of narcotics. It is only by division into two counts that the verdict returned by the jury could properly be interpreted, if it should become necessary—to determine what an appropriate sentence would be."

who, on the conspiracy counts, were found guilty on count 1 charging conspiracy to sell, but not guilty on count 2 charging conspiracy to purchase.

ARGUMENT

1. Petitioner's entire argument as to the proper scope of "plain error" under Rule 52 (Pet. 5–11) is, on the facts of this case, irrelevant because it is based on the erroneous premise that the judge did not charge on criminal intent. He did. The judge charged that "where one who knows that others are acting together to violate the law intentionally cooperates to further the object of the conspiracy, he becomes a party to it." This told the jury that to find petitioner guilty of conspiracy they had to find that he knew the object of the conspiracy, knew that the object was unlawful, and that he intended to further that unlawful object. That is unlawful intent. In absence of an objection or a request for a further charge, this was clearly sufficient and affords no basis for a claim of fundamental or plain error.[2]

It should be noted that the statement in the petition that the "essence of petitioner's defense was that he cooperated with [Whelan] in order to discover what he was up to" (Pet. 5), is not supported by the record as a whole. Petitioner did not admit his participation in the acts charged to him by the testimony of the government agents and try to explain his motive in thus acting. The essence of his testi-

[2] Thus, the case affords no occasion for resolution of the asserted conflicts (Pet. 10) among the circuits in application of Rule 52(b).

[1] The conspiracy count will itself support the sentence.

mony, as we read it, is the denial that he actively assisted the agent at all in dealing with narcotics. He explained his association with the agent (which was so corroborated that it could not be denied) by testimony that he thought the agent was a fence, and said that through that association he learned of the narcotics traffic. But he denied all the testimony as to active assistance. Thus, he denied that there was any discussion of narcotics at all when he first met the agent; denied any acquaintance with or knowledge of McMurray's narcotics activities; denied telling the agent that the agent could have dealt with Annette; and denied knowledge about the others except as told him by the agent.[5] The issue for the jury, therefore, was whether petitioner did actively promote the sale of narcotics, as the officers testified, or whether he did not do so, as petitioner claimed. That issue was directly submitted to the jury under the instructions quoted above and resolved against petitioner.

2. The fact that petitioner was found guilty of only one of the two counts of conspiracy, even though the judge charged that the two counts were aspects of one conspiracy, raises no question of general importance. The two counts were separated so that there could be no question which penalty applied, 5 to 20 years for sales without order form in violation of 26 U.S.C. 4705(a), or 2 to 10 years, the penalty for transactions not from the original stamped package in violation of 26 U.S.C. 4704(a). As the charges

[5] Petitioner never even requested an instruction embodying the "assistance" theory of defense on which the petition now claims he was placing his entire reliance. (Pet. App. 4a-5a).

were framed, however, count 1 dealing with the absence of an order form was couched (as it had to under the statute) in terms of sale, whereas the count dealing with the original package referred only to purchase (although sale and distribution are prohibited as well). The jury, obviously believing that petitioner and "Annette" were concerned only with the selling of narcotics, made a distinction between the two counts (see the Statement, *supra*, p. 8, as to the jury's question). Whether the separation of the purchase and sale aspects of the conspiracy was inadvertent or deliberate,* the acquittal of petitioner on the second count is clearly attributable to the special form in which the conspiracy was pleaded and raises no general question. And since petitioner did participate in conspiring to sell and selling without an order form, he can claim no prejudice from the manner in which the conspiracy was charged.

At most, petitioner's complaint is that under the instructions the verdicts were inconsistent: a single conspiracy was charged in two counts and he was acquitted by the jury on one of them. However, consistency in verdicts is not required. *Dunn* v. *United States*, 284 U.S. 390, 393.

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*Conceivably under some circumstances a conspiracy to purchase could be separate from a conspiracy to sell, but no such claim was made by the government when the judge charged that only one conspiracy was involved.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1962.